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Differential Treatment of Men and Women by Artificial Reproduction Statutes

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ESSAYS

DIFFERENTIAL TREATMENT OF MEN AND WOMEN BY ARTIFICIAL REPRODUCTION STATUTES

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> [The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.**

I. INTRODUCTION

For the law to remain relevant it must progress as society progresses. Advances in science and technology must be followed by advances in the law. This Essay will focus on two particular advances in science and technology—artificial insemination by donor and surrogate motherhood—and the laws relevant to these two methods of artificial reproduction. Specifically, the Essay will discuss the differential treatment of infertile men and women by artificial reproduction statutes.

As will be noted, most jurisdictions have enacted statutes providing that children born by the AID process be deemed legitimate and establishing that the husband[1] of the natural mother of the AID child be deemed the natural and legal father. However, no such statutes exist for surrogate motherhood arrangements. Therefore, a child born from a sur-

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** Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

1. The terms "mother" and "father" contain within them assumptions that most of us take for granted. Thus, use of the term "husband" rather than "father" reflects the lack of a word to describe adequately the difference in the roles of these two men in the artificial reproduction scenario.

rogate motherhood arrangement will be born illegitimate absent a saving statute;[2] the wife of the natural father must adopt the child to be deemed the legal mother.[3]

The Essay will first explore the typical AID and surrogate motherhood procedures. To understand fully their legal implications one must become familiar with the medical techniques and procedures used. Second, the Essay will discuss the differences in the law's treatment of the two artificial reproduction procedures. Finally, the differences in treatment will be analyzed with an eye toward possible constitutional violations due to the unequal treatment of infertile men and women.

II. ARTIFICIAL REPRODUCTIVE METHODS

A. *Artificial Insemination by Donor*

1. Medical Process

Today, artificial insemination is a widely accepted nonexperimental procedure. The process generally entails the introduction of male sperm into a female patient with a needleless hypodermic syringe.[4] Presently, three approaches to artificial insemination exist. First, when insemination is accomplished with the husband's sperm, the procedure is identified as Artificial Insemination Homologous (AIH).[5] Second, when insemination is accomplished with a donor's sperm, the procedure is labeled Artificial Insemination Heterologous (AID).[6] Third, when insemination is accomplished with a mixture of the husband's sperm and a donor's sperm, the procedure is called Confused Artificial Insemination (CAI).[7] With all three procedures, fertilization occurs inside the

2. For a typical saving statute, see D.C. CODE ANN. § 16-908 (1981). This section states that "[a] child born in wedlock or born out of wedlock is the legitimate child of its father and mother and is the legitimate relative of its father's and mother's relatives by blood or adoption." *Id.*

3. In this sense, adoption may be viewed as a "burden" placed upon the wife of the natural father.

4. *See* THE BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, THE NEW OUR BODIES, OURSELVES 318 (1984); Palm & Hirsh, *Legal Implications of Artificial Conception*, 1982 MED. TRIAL TECH. Q. 404, 406; Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 468 (1983).

5. AIH may be used when normal copulation fails because of various medical problems. *See* Carson & Batzer, *Homologous Artificial Insemination*, 26 J. REPRODUCTIVE MED. 231 (1981).

6. AID, at least to married couples, is presumed not to be the first alternative. AID, however, may be used either if the husband is sterile or fears transmitting genetic disease. *See* W. FINEGOLD, ARTIFICIAL INSEMINATION 18 (2d ed. 1976); Palm & Hirsh, *supra* note 4, at 407.

7. CAI is often cynically referred to as the "French firing squad technique." One justification for CAI contemplates a possible psychological benefit to a sterile husband who might rationalize that he has fathered the child conceived by his wife. Wadlington, *supra* note 4, at 469. One author suggests, however, that this structural fantasy exposes those men who would be poor AID candi-

mother's body and not in the laboratory. This Essay will concern itself with AID, for this particular procedure presents the legal issues most analogous to those generated by surrogate motherhood.

AID technology has been progressing rapidly since the first reported case in America in 1884.[8] Even before this incident, however, artificial insemination in farm animals was a growing practice. Presently, through modern cryogenic capabilities, semen can be frozen and stored for future use in sperm banks.[9] Some banks operate as commercial enterprises with little or no licensing requirements. Donor[10] selection is also largely unregulated. Many studies have shown that the recordkeeping with regard to donors is minimal.[11]

Only four people are directly concerned in the AID process—the mother, her husband, the donor, and, in most cases, the physician.[12] The husband is the only participant not playing an active role in the process. The AID child is not considered a participant, but is rather the product of the process.

2. Legal Treatment of AID

Among the legal issues[13] considered by courts in cases involving AID are adultery, the legal status of the child, and the parental status of the parties involved (donor, husband, and wife). Historically, AID has been viewed as an undesirable method of procreation. In 1945, a commission appointed by the Archbishop of Canterbury strongly criticized AID and recommended that it be made a criminal offense.[14] In a report

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dates. A. GUTTMACHER, W. BEST & F. JAFFE, BIRTH CONTROL AND LOVE: THE COMPLETE GUIDE TO CONTRACEPTION AND FERTILITY 279-80 (2d rev. ed. 1969).

8. R. SNOWDEN & G.D. MITCHELL, THE ARTIFICIAL FAMILY 13 (1981).

9. For an interesting review of sperm banking in the U.S., see HUMAN ARTIFICIAL INSEMINATION AND SEMEN PRESERVATION (G. David & W. Price ed. 1980).

10. "It has long been known that the term 'donor' is a euphemism and that, in fact 'donors' receive standard payments for 'donations' in various localities." Wadlington, *supra* note 4, at 471. For an interesting profile of a sperm donor, see Yagoda, *Daddy?*, CAMPUS VOICE, Feb.-Mar. 1985, at 46.

11. *See* Curie-Coehn, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585 (1979).

12. Although a physician is not necessary to artificially impregnate a woman, many statutes require that a physician perform the artificial insemination. *See* GA. CODE ANN. § 74-101.1(a) (Supp. 1985).

13. Of course, AID generates more than legal issues. There are ethical and religious issues which are as compelling as their legal counterparts. Many ethicists have stated their profound aversion to artificial manipulation of a natural process so closely tied to the mystery of life. *See generally* P. RAMSEY, FABRICATED MAN: THE ETHICS OF GENETIC CONTROL (1970). Both the Roman Catholic and Orthodox Jewish teachings consider AID adultery. THE BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, *supra* note 4, at 319.

14. R. SNOWDEN & G.D. MITCHELL, *supra* note 8, at 15.

published in 1960, the United Kingdom Feversham Committee also concluded that AID was an undesirable practice.[15]

AID was first considered by a North American court in 1921 in *Orford v. Orford*.[16] In *Orford*, the Supreme Court of Ontario expressed the view in dictum that a wife's submission to AID without her husband's consent would constitute adultery. The court stated that the essence of the offense of adultery was not so much the joinder of sexual organs as it was "the voluntary surrender . . . of the reproductive powers or faculties" by the wife to someone other than her husband.[17] A broader conclusion was reached by an Illinois trial court in 1954, which held that a child conceived by AID with or without the husband's consent constituted adultery and that the child so conceived would be illegitimate.[18] Not until the opinion of Lord Wheatley in a 1958 Scottish Court of Sessions case was AID viewed as not adulterous. Lord Wheatley stated that "[u]nilateral adultery is possible, as in the case of a married man who ravishes a woman not his wife, but self-adultery is a concept as yet unknown to the law."[19] Noting that adultery is concerned with the means and not the end result, the court held that AID even without the husband's consent was not equivalent to the physical contact proscribed by adultery. In *People v. Sorensen*,[20] the California Supreme Court, in confirming a conviction under a criminal nonsupport statute, also concluded that AID was not adultery.[21] The *Sorensen* approach is the modern view in the United States.

At common law, the AID child would have been illegitimate absent a contrary statutory or common law presumption[22] or a saving statute.[23] *Gursky v. Gursky*[24] is a case in point. In *Gursky*, the New York Supreme

15. *Id.*

16. 58 D.L.R. 251 (Ont. 1921).

17. *Id.* at 258.

18. Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Super. Ct., Cook County, Ill., 1954), *aff'd*, 139 N.E.2d 844 (1956). The court, however, found no difficulty with AIH from a legal point of view.

19. MacLennan v. MacLennan, 1958 Sess. Cas. 105, 114.

20. 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968) (en banc).

21. The court dismissed the idea that the doctor or donor and the wife commit adultery through the artificial insemination process, stating:

> Since the doctor may be a woman, or the husband himself may administer the insemination by a syringe, this is patently absurd; to consider it an act of adultery with the donor, who at the time of insemination may be a thousand miles away or may even be dead, is equally absurd.

Id. at __, 437 P.2d at 501, 66 Cal. Rptr. at 13.

22. For a typical presumption of legitimacy applicable to a child born during wedlock, see Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960) (en banc).

23. See *supra* note 2 for an example of a saving statute.

24. 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

Court viewed the AID child as illegitimate and noted that AID did not adhere to and satisfy the requirements of the state adoption statute.[25] Presently, many states provide by statute that an AID child shall have the same status as a naturally conceived child so long as both husband and wife consented to the procedure.[26] These statutes generally classify the husband as the child's natural father,[27] although such a result is a medical impossibility.

People v. Sorensen,[28] the case espousing the modern views on AID and adultery, is also the leading case as to the issue of paternity. In *Sorensen*, the California Supreme Court held that a husband who consented to AID was the child's lawful father and was to be registered as such on the birth certificate even if sterile.[29] Furthermore, in *In re Adoption of Anonymous*,[30] a husband who had consented to AID was deemed a parent whose consent was needed to allow the wife's new husband to adopt the AID child.[31] As previously noted, the modern trend is for a jurisdiction to have an AID statute making the husband who consents to AID the natural father of the child.[32]

Thus, in summary, absent a saving statute, a presumption of legitimacy, or an AID statute, an AID child is born illegitimate. However, the trend is to provide by statute that an AID child be deemed legitimate and that the husband of the mother be deemed the natural father of the child without resort to an adoption procedure.

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25. *See* Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948). In *Strnad*, the court stated that an AID child had been potentially adopted or semi-adopted by a husband consenting to artificial insemination, even though adoption has always been statutory. *Id.* at __, 78 N.Y.S.2d at 391-92.

26. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 45-69f to -69n (West 1981); GA. CODE ANN. § 74-101.1 (Supp. 1985); KAN. STAT. ANN. §§ 23-128 to -129 (1981); N.C. GEN. STAT. § 49A-1 (1984); OKLA. STAT. tit. 10, §§ 551-553 (1981).

27. *See, e.g.*, CAL. CIV. CODE § 7005 (West 1983); GA. CODE ANN. § 74-101.1 (Supp. 1985); LA. CIV. CODE ANN. art. 188 (West Supp. 1985); OR. REV. STAT. § 109.243 (1983).

28. 68 Cal. 2d at 280, 437 P.2d at 495, 66 Cal. Rptr. at 7.

29. *Id.* at __, 437 P.2d at 500, 66 Cal. Rptr. at 12.

30. 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sur. Ct. 1973).

31. *Id.* at __, 345 N.Y.S.2d at 435-36.

32. There has also been considerable debate among commentators about the potential rights and responsibilities of donors. In C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Juv. & Dom. Rel. Ct. 1977), a New Jersey court granted a semen donor visitation rights to a child conceived by an unmarried woman impregnated by his sperm. In that case, the donor and the woman knew each other. Section 5 of the Uniform Parentage Act explicitly provides that a donor of semen will not be regarded as the legal father of the child. UNIF. PARENTAGE ACT § 5(b), 9A U.L.A. 592-93 (1979). For an interesting discussion of when it may be in the best interests of an AID child to learn of the donor's identity, see Smith, *The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers*, 5 W. NEW ENG. L. REV. 639, 648 (1983).

B. *Surrogate Motherhood*

1. Medical Process

Surrogate motherhood is a generic term which can refer to several techniques, including one in which gestation takes place in a womb other than that of the egg donor. This technique may be used when pregnancy would be hazardous, impossible, or undesirable.[33] A woman in this situation could have ova removed from her body, fertilized *in vitro*,[34] and then implanted into the womb of a surrogate mother who would carry the baby to term.[35] However, the popular version of surrogate motherhood occurs when a woman conceives a child by AID, carries the baby to term, and relinquishes it to the sperm donor after birth in accordance with a preconception agreement. In most cases, the sperm donor's wife will adopt the child. In this latter scenario, surrogate motherhood has been regarded as the "female counterpart to AID."[36] As with AID, this version of surrogate motherhood is largely technologically independent.

The surrogate motherhood agreement is primarily a relationship based on contract principles.[37] The surrogate contracts to conceive the child of the husband by means of artificial insemination in return for expenses and, usually, a fee. Thus, the surrogate motherhood agreement requires the making of personal choices and commitments months in advance of performance.[38]

Four people are directly concerned in the surrogate motherhood process—the father, his wife, the surrogate mother, and, in most cases, the physician.[39] The wife is generally the only participant not playing an active role in the process.[40] Like the AID child, the surrogate motherhood child is not considered a participant, but is rather the product of the process.

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33. A woman who would use this type of surrogate motherhood arrangement is typically one who is fertile but has a heart condition, partial paralysis, or a history of miscarriages, or who cannot interrupt a career for pregnancy. Palm & Hirsh, *supra* note 4, at 414.

34. Unlike AID, *in vitro* fertilization (IVF) is technologically dependent. IVF requires extraction of a ripe egg from an ovary, fertilization in a glass dish, and implantation back into the womb. THE BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, *supra* note 4, at 320.

35. There are several documented reasons given for becoming a surrogate mother. The first is that acting as a surrogate satisfies some sentimental or maternal instinct. The other reasons are based on altruism, financial need, and a fascination with pregnancy. Smith, *supra* note 32, at 649-50.

36. *Id.* at 649.

37. *See* Note, *Surrogate Motherhood: Contractual Issues and Remedies Under Legislative Proposals*, 23 WASHBURN L.J. 601, 602 (1984).

38. *See* Comment, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. RICH. L. REV. 467, 469 (1982).

39. *See supra* note 12.

40. Of course, this is not true when the wife's egg is transplanted into the womb of a surrogate.

2. Legal Treatment of Surrogate Motherhood

As previously stated, the surrogate motherhood arrangement is based on contract principles. However, several legal obstacles to surrogate motherhood agreements exist. In at least twenty-four states, paying a mother to give up a child for adoption is unlawful.[41] For example, in *Doe v. Attorney General*,[42] the Michigan Court of Appeals held that the Michigan "baby brokering" law[43] prohibited payment to a surrogate mother in connection with an adoption. The court held that a couple's fundamental right to make procreative decisions encompassed the right to bear a child with the aid of a third party—the surrogate.[44] However, the court held that this constitutional right did not give the surrogate the right to bear a child for pay or to use the adoption laws to transfer the child to the contracting couple.[45] On the other hand, in *Surrogate Parenting Associates, Inc. v. Commonwealth ex rel. Armstrong*,[46] the Kentucky Supreme Court found fundamental differences between the surrogate parenting procedure and the buying and selling of children. These differences included the "central fact [that] in the surrogate parenting procedure . . . the agreement to bear the child is entered into *before* conception" and the surrogate's primary motivation for agreeing to the procedure is not to relieve herself of the burden of childrearing, but to help a couple have a biologically related child.[47] The *Surrogate Parenting* rationale appears to be the more compelling, as a surrogate motherhood arrangement is not what the legislatures had in mind when they enacted the baby selling laws. Furthermore, if one is to assume, as the Michigan Court of Appeals has, that the right to procreative decisions encompasses the right to bear a child with the aid of a surrogate, then it would seem only logical that the surrogate be paid for the services she performs. Any other result is not only detrimental to the collaborative right of procreation, but also ill-fated because it will force surrogate arrangements into

41. Andrews, *The Stork Market: The Law of the New Reproduction Technologies*, A.B.A. J., Aug. 1984, at 50, 52. The typical fee for surrogate services is $10,000 plus all medical, legal, and insurance costs. Gelman & Shapiro, *Infertility: Babies by Contract*, NEWSWEEK, Nov. 4, 1985, at 74. A couple can expect to pay $25,000 to $30,000 overall. *Id.* at 75.

42. 106 Mich. App. 169, 307 N.W.2d 438 (1981).

43. MICH. COMP. LAWS ANN. § 710.54 (West Supp. 1985).

44. 106 Mich. App. at 173, 307 N.W.2d at 441.

45. *Id.*

46. No. 85-SC-421-DG (Ky. Feb. 6, 1986). The action arose when the state attempted to revoke petitioner's corporate charter for abuse and misuse of corporate powers. *Id.* at 1. The state alleged that petitioner's surrogate parenting procedures violated state laws prohibiting the sale of babies. *Id.* at 1-2.

47. *Id.* at 5-6 (emphasis in original).

hiding. Although the surrogate will appear to provide her services altruistically, financial arrangements will be made under the table.

Yet another obstacle to surrogate motherhood is the AID statutes. These statutes specifically provide that a sperm donor is not the legal father of a child conceived by the artificial insemination of a woman not his wife.[48] This obstacle, however, is mere fantasy. The purposes of AID statutes are to make the AID child legitimate[49] and to make the consenting husband of the mother the child's natural father.[50] AID statutes were not passed to regulate situations in which the sperm donor was known and did indeed wish to be the legal father.[51]

In *Syrkowski v. Appleyard*,[52] the Michigan Court of Appeals strictly applied the state's paternity act to deny an attempt by a husband sperm donor to use a custody proceeding to validate a surrogate arrangement.[53] The court stated:

> We view the surrogate mother arrangements with caution as we approach an unexplored area in the law which, without a doubt, can have a profound effect on the lives of our people. The courts should not be called upon to enlarge the scope of The Paternity Act to encompass circumstances never contemplated thereby. Studied legislation is needed before surrogate arrangements are recognized as proposed under the facts submitted herein.[54]

The Michigan Supreme Court later reversed the court of appeals, stating that the trial court had jurisdiction under the state's paternity act to allow the plaintiff Syrkowski to prove paternity.[55] It may be an overstatement to conclude that *Syrkowski* itself legalizes surrogate motherhood; however, the trend is undeniably toward making surrogate motherhood arrangements legal and viable exercises of the right of procreation. Presently, twenty-one jurisdictions are considering surrogate motherhood legislation.[56] Of these jurisdictions, only four are considering prohibiting the surrogate process.[57]

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48. *See supra* notes 26-27.

49. *See* Comment, *supra* note 38, at 472.

50. *See* Andrews, *supra* note 41, at 53.

51. *Cf.* C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Juv. & Dom. Rel. Ct. 1977) (court granted sperm donor whose identity was known to unwed mother visitation rights to AID child).

52. 122 Mich. App. 506, 333 N.W.2d 90 (1983).

53. *Id.* at 509, 333 N.W.2d at 91.

54. *Id.* at 515, 333 N.W.2d at 94 (footnote omitted).

55. Syrkowski v. Appleyard, 420 Mich. 367, 362 N.W.2d 211 (1985).

56. 11 FAM. L. REP. (BNA) 3001, 3003 (Jan. 29, 1985).

57. *Id.* at 3003. One commentator has expressed the view that surrogate motherhood violates the thirteenth amendment prohibition against slavery—sale of one person by another. Holder, *Surrogate Motherhood: Babies for Fun and Profit*, CASE & COM., Mar.-Apr. 1985, at 3, 9. This view, I believe, shows a fundamental lack of understanding of surrogate motherhood.

Thus, in summary, assuming that surrogate motherhood is lawful, a child born from this process may nevertheless be deemed illegitimate absent a surrogate motherhood statute[58] or saving statute. Furthermore, the wife of the father is not deemed the natural parent of the child as is her male AID counterpart. Instead, for her to obtain the rights and responsibilities of a natural parent, she must adopt the child of her husband.[59]

III. EQUAL PROTECTION ANALYSIS UNDER THE FOURTEENTH AMENDMENT

A. *Sex-Based Classifications*

The fourteenth amendment to the United States Constitution states, in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*[60]

What this passage means has been and will always be the subject of great debate. Most commentators are in agreement, however, that the purpose of the equal protection clause is to protect those people excluded from the political process or, as has more recently been the case, to protect those rights viewed as fundamental in our society.[61]

An argument can be advanced that AID statutes violate the equal protection clause because they allow infertile men to exercise their right of procreation with the aid of a third party donor while not encompassing the right of infertile women to exercise their right of procreation with the aid of a third party surrogate. Although it must be recognized that the state has particularly broad powers regarding the rights and status of parents and children, the power of the state is necessarily subject to the demands of the equal protection clause.[62]

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58. For example, Maryland House of Delegates Bill No. 1552, proposed during the 1985 session, would have provided that all children born by the surrogate motherhood process are legitimate. H.D. 1552, 1985 Md. Leg.

59. Technically, the wife could use a streamlined procedure for a stepparent adoption in a jurisdiction that recognizes such a procedure. *See* Andrews, *supra* note 41, at 52.

60. U.S. CONST. amend. XIV, § 1 (emphasis added).

61. *See generally* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

62. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979) (Court struck down on equal protection grounds a New York statute allowing unwed mother, but not unwed father, to block adoption of child by withholding consent).

In analyzing whether AID statutes violate the Constitution, one must first determine the proper standard for reviewing the classification created by these statutes. Since *Craig v. Boren*,[63] the standard for review has been settled, at least in theory. "To withstand constitutional challenge, previous cases establish that *classifications by gender* must serve important governmental objectives and must be substantially related to achievement of those objectives."[64] This standard of review, however, presupposes that the court has found a gender-based classification. Such an observation begs the question. What is a gender-based classification? Section 5 of the Uniform Parentage Act[65] (U.P.A.) provides:

> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, *the husband is treated in law as if he were the natural father of a child thereby conceived.* The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.
>
> (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.[66]

Section 5 has had a great influence on subsequent AID statutes in the United States. It will serve, therefore, as a useful statutory model in our equal protection analysis. Section 5 confers a benefit to infertile married men. That is, a married man who consents to have his wife artificially inseminated by a donor will, upon the birth of a child, be "treated in law as if he were the natural father."[67] Again, is this a gender-based classification?

The answer to this pivotal question might appear quite simple to

63. 429 U.S. 190 (1976).

64. *Id.* at 197 (emphasis added); *see also* Califano v. Webster, 430 U.S. 313, 316-17 (1977) (applying the *Craig* standard to challenged provisions of Social Security Act).

65. 9A U.L.A. 592-93 (1979). The U.P.A. was approved by the National Conference of Commissioners on Uniform State Laws in 1973 and by the A.B.A. House of Delegates in 1974.

66. *Id.* (emphasis added).

67. *Id.* § 5(a). Section 5 also confers benefits on the wife of the infertile man because she can exercise her right of procreation and on the AID child who will be presumed legitimate.

novices in the constitutional field; a gender-based classification is one that is based on men and women and the differences between them. To those commentators well-versed in the law, however, the answer is not so simple. At least since *Geduldig v. Aiello*[68] and *Personnel Administrator v. Feeney*,[69] the answer, although fundamental, has often proved mysterious. A statute that discriminates on its face between men and women is gender-based.[70] However, under *Aiello*, a statute that discriminates between pregnant and non-pregnant persons is not a gender-based classification.[71] This is true even though to date only women can become pregnant, and, therefore, only women can be harmed by pregnancy. Thus, a characteristic as closely associated with gender as pregnancy is not the basis of a gender-based classification. The conclusion that pregnancy-based classifications are not in themselves gender-based may suggest an exceedingly formalistic view. This, nevertheless, is the view of a majority of the Supreme Court.

The pivotal question then becomes whether AID statutes more closely resemble *Craig*-type or *Aiello*-type statutes. A few examples may help to shed light on this issue. In *Aiello*, we know that the difference between pregnant and non-pregnant persons is not gender-based. But what if the Court were confronted with a medical disability plan that differentiated between vasectomies and hysterectomies or between male and female breast cancer? In these examples we have something more than an *Aiello*-type classification because the distinctions are gender-based. So, too, is the distinction drawn by AID statutes. AID statutes confer a benefit to infertile men in the form of an irrebuttable presumption. Men who consent to the AID process are treated as the legal parent of the child. This is so even though the child could not possibly be the offspring of the infertile man. Thus, AID statutes create a legal fiction which benefits infertile married men and permits them to exercise their

68. 417 U.S. 484 (1974). *Aiello* involved a state statute establishing a disability insurance system for private employees. Plaintiffs challenged the statute as underinclusive on equal protection grounds for its failure to insure the risk of disability from a normal pregnancy. The Supreme Court upheld the statute. *Id.* at 494.

69. 442 U.S. 256 (1979). In *Feeney*, plaintiff challenged a state hiring and promotion statute favoring veterans for civil service positions. Although the statute operated "overwhelmingly to the advantage of males," the Court upheld the statute against an equal protection challenge. *Id.* at 259.

70. *See Craig*, 429 U.S. at 197; Reed v. Reed, 404 U.S. 71, 76-77 (1971). *But see* Kahn v. Shevin, 416 U.S. 351, 352 (1974) (upholding a Florida statute providing for a property tax exemption for widows).

71. 417 U.S. at 496 n.20; *see also Feeney*, 442 U.S. at 275 (classification was one of veteran and non-veteran).

fundamental right of procreation. No such benefit is conferred upon infertile married women.

Assuming that AID statutes as written fall under the *Craig* classification, they cannot be saved merely because an infertile woman may take steps to adopt the child and, thus, attain the rights conferred by the AID statutes to infertile men. The argument goes on to say that if a woman fails to take advantage of the procedures available, she should not be heard to complain of the discriminatory impact of AID statutes. But this type of argument was expressly rejected in *Kirchberg v. Feenstra*.[72] In *Kirchberg*, the Supreme Court invalidated a statute that gave a husband, as head and master of property jointly owned with his wife, the unilateral right to dispose of the property without his spouse's consent. The state's view was that the statutory scheme was not unconstitutional because it provided a procedure whereby the wife could have made a "declaration by authentic act" and stopped the disposition of the property.[73] The additional procedure also required that the declaration be filed in the mortgage and conveyance records of the parish in which the property was located.[74] The Court stated that "the 'absence of an insurmountable barrier' will not redeem an otherwise unconstitutionally discriminatory law."[75] The rationale in *Kirchberg* is compelling. AID statutes confer certain rights upon infertile men and, by implication, withhold those same rights from infertile women. Infertile women could obtain the same rights given to infertile men automatically by statute, by engaging in the additional procedure of adoption. Certainly, in many cases adoption is not an insurmountable barrier.[76] However, under *Kirchberg*, the goal need not be unattainable.

One may advance the argument that whatever the impact, without discriminatory legislative motives, AID statutes should be declared constitutional.[77] This would be the case had we been confronted with a gender-neutral statute as in *Feeney*, but as previously noted, AID statutes are not and cannot be construed as gender-neutral. Infertile men and women are similarly situated. Neither can exercise their right of procreation without the aid of a third party semen donor or surrogate. Only

72. 450 U.S. 455, 461 (1981).
73. *Id.* at 460-61.
74. *Id.* at 460 n.8.
75. *Id.* at 461 (citations omitted).
76. This is not the case with an unmarried woman or a woman engaged in a lesbian relationship. Moreover, couples seeking surrogates have usually exhausted the possibility of adoption. *See* Gelman & Shapiro, *supra* note 41, at 74.
77. *Accord Feeney*, 442 U.S. at 272.

infertile men, however, are entitled to the special rights afforded by AID statutes.[78]

A finding that AID statutes are unconstitutional because they violate the equal protection clause is supported by the traditional Tussman-tenBroek equal protection model.[79] Under the Tussman-tenBroek model, one must look beyond the classification to the purpose of the law in question.[80] The purpose of AID statutes is the achievement of some positive public good. Specifically, AID statutes provide a means whereby a couple who cannot conceive a child can, in fact, have a child with the aid of a donor. This child will be deemed legitimate and the husband treated as the natural father. Tussman and tenBroek speak of the relation of the classification to the purpose of the law as the relation of the "trait" to the "mischief."[81] In our case, the trait is all males who are married and infertile or who carry a hereditary disease. The mischief is to help infertile couples have a child part "theirs" whose legal parents are the mother (wife) and her husband (father).

The usual equal protection problem concerns the relation of two classes to one another.[82] The first class consists of all individuals possessing the defining trait[83]—in this case, all married men who are infertile or who have a hereditary disease. The second class consists of all individuals tainted by the mischief at which the law aims[84]—in this case, all married men and women who are infertile or who carry hereditary diseases, who want a child of "their" own who is deemed legitimate, and who want to be treated as the natural parents. The first class is defined by the legislative classification drawn by AID statutes, while the second class

78. It is relevant to note that the first AID statute was passed in the early 1960's when women were not a politically active group. In terms of reproduction, women have been the victims of discrimination as far back as the Old Testament. *See* L. GORDON, WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA 1-46 (1976). American women began their quest for reproductive freedom with the birth control movement of the mid-nineteenth century. *See* Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 405 (1983). For an interesting discussion of the background of birth control in the United States, see L. GORDON, *supra*. The law's response to the childbearing issue marks a pivotal point in the emergence of women as first class citizens. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 376 (1981). Yet, as Professor Ely notes, "exaggerated stereotyping . . . has long been rampant throughout the male population and consequently in our almost exclusively male legislatures in particular." J. ELY, *supra* note 61, at 164. "Absent a strong demonstration of mitigating factors, therefore, we would have to treat gender-based classifications that act to the disadvantage of women as suspicious." *Id.*

79. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

80. *Id.* at 346.

81. *Id.*

82. *Id.* at 347.

83. *Id.*

84. *Id.*

consists of those individuals similarly situated with respect to the purposes of the AID statutes.

Tussman and tenBroek then talk of five possible relationships between the trait and the mischief.[85] Relationship three is applicable to our case; that is, the AID statutes are underinclusive. All who are included in the class are tainted with the mischief, but others who are tainted are not included within the classification. Therefore, a prima facie violation of the equal protection clause has been shown.[86] The question then becomes to what degree a legislature should be permitted to generalize or to deal with portions of a problem at a time and thus to fall short of perfect congruence. Whatever that exact figure may be, a fifty percent congruency is too inexact. The fact that over fifty percent of all infertility is traceable to the woman becomes paramount.[87] Thus, sex is not a sufficiently accurate proxy for infertility. Granted, legislatures are not required to meet perfect congruency; however, when the classification is sex-based, such a great amount of incongruency is intolerable. Furthermore, "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection."[88]

This result is highlighted by the use of a technique articulated in *Orr v. Orr*.[89] In *Orr*, the Supreme Court directly analogized race discrimination to sex discrimination. "There is no question but that Mr. Orr bears a burden he would not bear were he female. The *issue is highlighted, although not altered*, by transposing it to the sphere of race."[90] An artificial reproduction statute providing that infertile white men would be treated as the natural father of a child while denying the same benefit to infertile black men would be clearly unconstitutional. The result should be no less in this case. It is important to note that even under the traditional Tussman-tenBroek equal protection model, the classification

85. *Id.* Tussman and tenBroek use Venn diagrams to demonstrate ideal limits of reasonableness, unreasonableness, underinclusiveness, overinclusiveness, and both over- and underinclusiveness. *Id.*

86. *Id.* at 348.

87. TEXTBOOK OF MEDICINE 1780 (P. Beeson & W. McDermott 14th ed. 1975). This source attributes 40% of all infertility to men and 70% to women. (A total in excess of 100% indicates multiple causes of infertility.) *Id.*; *see also* Palm & Hirsh, *supra* note 4, at 404.

88. Orr v. Orr, 440 U.S. 268, 283 (1979) (citation omitted).

89. *Id.* at 268. Appellant, ordered to pay alimony to his wife upon divorce, challenged on equal protection grounds Alabama statutes that could require husbands, but not wives, to pay alimony. *Id.* at 271.

90. *Id.* at 273 (emphasis added); *see also* Scales, *supra* note 78, at 393.

would be unconstitutional. Thus, a fortiori, the classification would be unconstitutional under most of the more liberal feminist equality models.[91]

B. *Application of the Middle Tier Approach*

After the case has been made that AID statutes discriminate against infertile women,[92] the burden is on the party seeking to uphold the AID statute (in this case, the state) to advance an "exceedingly persuasive justification for the challenged classification."[93] The governmental interests in enacting AID statutes are to preserve marriage between an infertile couple,[94] to codify certain common law presumptions,[95] to provide for the legitimacy of AID children,[96] to avoid transmission of genetic disease,[97] and to promote collaborative procreation.[98] The fundamental question is whether these reasons convert into important governmental objectives and whether the AID statute is substantially related to the achievement of these objectives.[99] It is important to note that the test is phrased in the conjunctive; therefore, both conditions must be met.

Do the proffered governmental reasons convert into important governmental objectives? Certainly all five reasons are legitimate. The latter three may also be important. Certainly the right to procreate is not only

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91. *See* Scales, *supra* note 78, at 434-35. The author recognizes that *in utero* pregnancy is a difference between the sexes that cannot be ignored. But this does not negate gender-neutral childrearing or parenting concepts. Under the author's "incorporationist approach," the classification drawn by AID statutes would be unconstitutional. *Id.* at 435.

92. AID statutes also discriminate against the husband of an infertile woman and against any child born by the surrogate motherhood process. *Accord* Califano v. Goldfarb, 430 U.S. 199 (1977) (plaintiff was a man complaining of discrimination against his deceased wife).

93. Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); *see also* Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 151 (1980) (state's justification for unequal treatment of men and women under Missouri workers' compensation laws was insufficient to support the statutory advantage).

94. *See* R. SNOWDEN & G.D. MITCHELL, *supra* note 8, at 75.

95. The typical presumption relevant here is the Lord Mansfield presumption that a child born during wedlock is the natural child of his mother and her husband. *See* Andrews, *supra* note 41, at 53. Such a presumption is in effect in at least 18 states. *Id.*

96. This is unequivocally one of the major thrusts of the AID statutes. Note, *Artificial Insemination and Surrogate Motherhood—A Nursery Full of Unresolved Questions*, 17 WILLAMETTE L. REV. 913, 924-25 (1981). Legitimacy is always in the best interest of the child, and the best interest of the child is a compelling state interest. *See* Graham, *Surrogate Gestation and the Protection of Choice*, 22 SANTA CLARA L. REV. 291, 304 (1982).

97. *See* Palm & Hirsh, *supra* note 4, at 407.

98. Through collaborative conception one can exercise the right of procreation. Robertson, *supra* note 78, at 423. For an excellent discussion on the constitutional right of procreation, see *id.* at 414-20.

99. Craig v. Boren, 429 U.S. 190, 197 (1976); *see also* Califano v. Webster, 430 U.S. 313, 316-17 (1977).

important, but also compelling.[100] Therefore, at least some of the reasons for AID statutes may be said at first glance to convert into important governmental objectives.

Are the AID statutes substantially related to the achievement of the proffered governmental objectives?[101] The only logical and rational answer is no. The AID statutes are grossly underinclusive. If the proffered reasons for the statutes are important, and we have assumed they are, then denying their special rights to couples who cannot procreate due to the woman's infertility frustrates those purposes.[102] Presently, in the United States, one in six people is affected by infertility.[103] More than one-half of these infertilities are traceable to the woman.[104] Therefore, not encompassing women in AID-like statutes and, thus, requiring them to adopt a child conceived through a surrogate arrangement frustrates the articulated purposes of the AID statutes.[105]

It goes without saying that laws may classify even though classification is in a real sense inequality. The Constitution has never required that things different in fact be treated in law as though they were the same. Abstract symmetry is not demanded by the Constitution.[106]

Are infertile men and women similarly situated in exercising their right of procreation through the aid of a third party? In essence, the question may be whether surrogate motherhood is the female counterpart to AID. Cutting through the factual distinctions, the answer by necessity must be yes, at least until the development of the artificial womb.[107] This is so because the focus must be on the right of procreation and not on surrogate motherhood as the remedy or means by which the right may be exercised.

This is not to say, however, that AID and surrogate motherhood

100. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Robertson, *supra* note 78, at 414-20.

101. *See supra* notes 94-98 and accompanying text.

102. When viewed in this light, the AID statutory scheme seems more ludicrous than it is in fact. There is no question, however, that the contemporary policy completely frustrates an infertile woman's right of procreation.

103. Andrews, *supra* note 41, at 50.

104. *See supra* note 87.

105. "If childrearing were the sole reason for procreation, adoption might well serve the procreative needs of infertile persons. The urge to procreate, however, usually involves a desire to transmit one's own genetic heritage to the child and to participate in gestation and parturition." Robertson, *supra* note 78, at 423 (footnote omitted). An adoption proceeding in this context appears absurd. Furthermore, there is the existence of a birth certificate and other records declaring the adoption of the child. *See* R. SNOWDEN & G.D. MITCHELL, *supra* note 8, at 18.

106. *Skinner*, 316 U.S. at 540.

107. "The [surrogate] process is not biologically different from the reverse situation where the husband is infertile and the wife conceives by artificial insemination." Surrogate Parenting Associates, Inc. v. Commonwealth *ex rel.* Armstrong, No. 85-SC-421-DG, slip op. at 7 (Ky. Feb. 6, 1986).

may not be differentiated. For example, the identity of the surrogate in a surrogate motherhood arrangement is known, while in the typical AID case the donor is anonymous.[108] Furthermore, the surrogate mother has greater fetal control.[109] Although these differences are important, they are not compelling enough to restrict the rights of infertile women. "Though the historical subjection of women was premised on biological differences, the present institutions and customs which rest on that subjection cannot be justified by reference to the 'nature of things.' "[110] These factual differences, however, go to the remedy or means by which a woman exercises her right of procreation. As to the right itself, men and women are similarly situated.[111]

Many criticisms have been leveled against the concept and practice of surrogate motherhood. Among these criticisms are (1) the physical harm to the couple or surrogate; (2) the possible mental and physical harm to the child; (3) the "commercialization" of procreation (e.g., "rent a womb"); and (4) the fear that surrogate motherhood will confuse family lineage and blur the meaning of the traditional family.[112] These criticisms, however, are not insurmountable. First, any harm to the couple or donor can be lessened by requiring a licensed medical practitioner to perform the medical procedures needed for surrogate motherhood. States could also require greater information and counselling for the parties about the process.[113] Some of these services are already provided for in the AID process. Second, increased mental and physical harm to the child from surrogate motherhood vis-à-vis AID is not substantiated by the evidence.[114] Furthermore, experimentation with embryos not implanted is already unlawful in many states.[115] Third, there is no evidence that surrogate motherhood will increase the commercialization of pro-

108. Smith, *supra* note 32, at 654.

109. *Id.*

110. Scales, *supra* note 78, at 425.

111. The right/remedy (method) dichotomy is not novel. Merely because men and women are not similarly situated as to the remedy does not, of itself, impact adversely on the right when men and women are similarly situated. *Cf.* Parham v. Hughes, 441 U.S. 347, 362 (1979) (White, J., dissenting).

112. Robertson, *supra* note 78, at 424-25.

113. *Id.* at 433-34. By requiring greater screening for surrogate motherhood and not for AID, a state may generate more equal protection concerns. The Constitution may require that AID donors be screened as well. Many would agree with this proposition, but it may not be constitutionally mandated. As to the remedy or means by which men and women exercise their right to procreate, they are not similarly situated. This fact will not, however, work to deny the right altogether. *Cf.* Roe v. Wade, 410 U.S. 113 (1973) (a state may regulate the right to terminate a pregnancy, but cannot deny such a right).

114. Robertson, *supra* note 78, at 434.

115. Andrews, *supra* note 41, at 51-52.

creation any more than AID.[116] Any advertisement of surrogate services would be subject to state regulation. Fourth, there has also been no evidence that surrogate motherhood vis-à-vis AID will confuse family lineage or blur the meaning of the traditional family.[117] The American view is that the family has the right to decide when and how to increase its membership.[118]

It is important to note that most of the criticisms against surrogate motherhood were previously advanced against another form of artificial reproduction—AID.[119] Thus, no valid reasons exist against providing infertile women the same rights as infertile men. "[A] legal distinction based on the natural lottery of physical equipment is not reasonable."[120] Moreover, perceived immorality alone is not sufficient to justify limiting the reproductive rights of others without a showing of tangible harm to some legitimate state interest.[121]

C. *Equal Protection Right of Procreation*

The differential treatment of infertile men and women by artificial reproduction statutes has been framed up to this point in terms of equality. As Professor Peter Westen has shown, however, a claim of equality always masks a claim of substantive right.[122] Here, the substantive right is the right of procreation.

The roots of the right of procreation can be found in *Skinner v. Oklahoma*.[123] In *Skinner*, the Supreme Court stated that marriage and procreation are among "the basic civil rights of man."[124] However, in *Skinner* and in more recent cases dealing with procreation, the opinions presuppose that procreation will take place within a marriage or a traditional family[125] and assume that the conception and bearing of children was natural.[126] Whether these precedents will apply to the surrogate motherhood relationship would be conjecture at this point.

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116. *See* Graham, *supra* note 96, at 304-05.

117. Robertson, *supra* note 78, at 425; *see also* Kass, *"Making Babies" Revisited*, 54 PUB. INTEREST 32 (1979); Kass, *Making Babies—the New Biology and the "Old" Morality*, 26 PUB. INTEREST 18 (1972).

118. Robertson, *supra* note 78, at 435.

119. *See* R. SNOWDEN & G.D. MITCHELL, *supra* note 8, at 117, 121, 127.

120. Robertson, *supra* note 78, at 428 (footnote omitted).

121. *See* Poe v. Ullman, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting).

122. Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

123. 316 U.S. 535 (1942).

124. *Id.* at 541.

125. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

126. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Illinois, 405 U.S. 645 (1972).

The right to procreate was given a shot in the arm by *Roe v. Wade*[127] and its progeny. Whether the right of privacy will protect an infertile woman's right to procreate with the aid of a surrogate is debatable. As Professor Robertson has eloquently stated, "[f]reedom to have sex without reproduction does not guarantee freedom to have reproduction without sex. Full procreative freedom would include both the freedom *not* to reproduce and the freedom *to* reproduce when, with whom, and by what means one chooses."[128] However, it is difficult to envision today's Supreme Court expanding *Roe* to include the affirmative right to procreate.

The importance of the right of procreation is not necessarily founded upon the concept of an equal protection fundamental right,[129] but that the right of procreation is impinged by artificial reproduction statutes which classify on the basis of sex. Therefore, impingement on the right of procreation solidifies the view that contemporary artificial reproduction statutes are unconstitutional, for they not only frustrate the right, but also classify on the basis of sex.

IV. CONSTITUTIONAL REMEDY

After a court declares a statutory scheme unconstitutional, it must fashion an appropriate remedy. Basically, a court may fashion three types of remedies for the violation.

The first remedy for the court is to refuse to enforce the unconstitutional statute.[130] Such a remedy would not be appropriate in this case for two related reasons. Technically, the typical case in which a court should refuse to enforce a statute is when the statute affirmatively restricts the rights of a particular class.[131] The AID statutes are not within such a class of statutes. Instead, they were passed for some public good

127. 410 U.S. 113 (1973).

128. Robertson, *supra* note 78, at 406 (emphasis in original).

129. Only a few rights have been classified as fundamental equal protection rights. Among them are voting rights, *e.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965); Reynolds v. Sims, 377 U.S. 533 (1964); certain criminal procedural rights, *e.g.*, Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); the right of interstate travel, *e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); and possibly the right to privacy concerning decisions of intimacy and procreation, *e.g.*, Whalen v. Roe, 429 U.S. 589 (1977); Skinner v. Oklahoma, 316 U.S. 535 (1942).

130. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-80 (1803); *cf.* Norton v. Shelby County, 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law . . . it is . . . as inoperative as though it had never been passed.").

131. *See* Craig v. Boren, 429 U.S. 190 (1976).

(i.e., to legitimize AID children and to treat the husband of the mother as the natural father). Pragmatically, refusing to enforce AID statutes helps no one and hinders the fundamental right of procreation. To deny to infertile men that which has been denied to infertile women is like throwing the baby out with the bath water. Such a result would be ludicrous.

The second remedy for the court is that espoused by Professor Ely for statutes struck down due to gender-based classifications. Ely writes that a court should render unconstitutional a statute which discriminates on the basis of sex, and, if the statute were to be reenacted by the legislature, the court should uphold it.[132] Ely rests this novel approach on the observation that many, if not most, laws that discriminate on the basis of sex were initially passed before women's suffrage[133] or at least before women were a political force.[134] Ely points out that women in America are not discrete nor insular nor even a minority.[135] This is a pivotal fact in Ely's view of equal protection analysis. Without a finding that the group discriminated against is a discrete and insular minority, Ely finds no reason for the court to aggressively scrutinize legislation affecting it.[136] Although logical, Ely's remedy is nevertheless overly simplistic when viewed in light of the current political process. No doubt women are a political force to be reckoned with at the national level. However, their national force has not been converted into any real grass roots force at the state level.[137] AID statutes are state statutes passed by state legislatures, and state legislatures are typically male dominated.[138] Ely's remedy gives the ultimate power back to those who abused it in the first instance. Such a result cannot help but conjure up images of the proverbial fox guarding the chicken coop; at best, the chickens are left with an uneasy feeling.

The third remedy for the court is to judicially refashion the right at issue. A similar process is often undertaken to keep from declaring a law

132. J. ELY, *supra* note 61, at 169-70.

133. The nineteenth amendment became effective in 1920. Therefore, laws passed before 1920 would fall into this class. AID statutes, as previously noted, were first passed in 1964 (Georgia) and, thus, would not fall within the class.

134. Professor Ely does not point to any specific date when women became a political force in the United States.

135. J. ELY, *supra* note 61, at 164.

136. *Id.*

137. Although this statement is illogical on its face, it is nevertheless true. In this regard, the women's movement is much like the labor movement, which also historically has had greater power on the national rather than the state level.

138. In state legislatures, maleness is the norm. Presently, 83% of all state legislators are men.

unconstitutional. A typical example is to read the term "man" to include "woman."[139] Essentially, the court would take notice of the purposes of the AID statute and extend its benefits to the class discriminated against (i.e., infertile women, their husbands, and any children born of surrogate motherhood arrangements). Such a result would not only promote the purposes of the AID statutes, but also promote those purposes more perfectly. One adverse to what has been labeled substantive due process or, more cynically, super-legislating, may cry foul to such a remedy. After all, the result would make surrogate motherhood or something akin to it lawful, a decision the legislature should make. Furthermore, such a remedy is quite similar to the remedy ordered by the Supreme Court in *Roe v. Wade* and would be subject to all the criticism mounted against *Roe*. These fears, however, are unfounded. We are concerned with an equal protection case and not a substantive due process case. We are not directly concerned with the nebulous right of privacy, but a classification based on sex. We are also not dealing with the creation of a "new" right as in *Roe*, but with a right already expressed by legislatures and conferred to infertile men. Finally, conferring this right to infertile women is not comparable to the step taken by the Supreme Court in *Roe*. Extending a right previously denied to a class on account of sex should never be viewed as a quantum leap.[140]

V. CONCLUSION

Advances in science and technology now permit an infertile woman to exercise her right of procreation through the aid of a surrogate. However, the offspring born of a surrogate arrangement is technically illegitimate, and the woman must adopt the child to obtain the rights of a natural parent. No such obstacles are present when an infertile man exercises his right of procreation through the aid of a semen donor. To the contrary, AID statutes affirmatively remove these obstacles, but only for infertile men. As previously noted, the classification drawn by these artificial reproduction statutes is unconstitutional because it violates the equal protection clause. The only appropriate remedy is to extend the benefit conferred by AID statutes to infertile women. This may be a de facto call for recognition of surrogate motherhood, but it is a de facto call required by the Constitution. Any other conclusion would relegate wo-

139. This is often the tack used by courts when confronted with a criminal statute that contains the term "man." *But see* Michael M. v. Superior Court, 450 U.S. 464 (1981) (statutory rape law protecting females under 18 survived equal protection challenge of male charged with its violation).

140. *See* Robertson, *supra* note 78, at 429.

men to second class citizenship. Any other result would hamper the exercise of a right as fundamental as any—the right to procreate.